No. 4679

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLYMPIA CANNING COMPANY, a corporation,
Plaintiff in Error,

vs.

THE UNION MARINE INSURANCE COMPANY, LTD., a corporation,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR DEFENDANT IN ERROR.

S. HASKET DERBY,
CARROLL SINGLE,
BRUCE C. SHORTS,
Merchants Exchange Building, San Francisco,
Attorneys for Defendant in Error.

Parker Printing Company, 523 Clay Street, San Francisco

No. 4679

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLYMPIA CANNING COMPANY, a corporation,
Plaintiff in Error,

vs.

THE UNION MARINE INSURANCE COMPANY, LTD., a corporation,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR DEFENDANT IN ERROR.

This case, though dealing with a maritime subject, is not an admiralty case, but was brought by plaintiff at common law. Hence, as distinguished from the rule in admiralty cases, the District Court's findings of fact are conclusive, if there is *any* evidence to support the same and no review of the evidence in detail is necessary, the sole question (in our opinion) being whether the findings support the judgment. And this, as will be seen, raises *only* the legal question, raised by plaintiff's demurrer to defendant's answer, namely, whether

the sinking of a vessel shortly after leaving her dock, in fair weather and on a calm sea, can be said to be a loss by "perils of the sea", insured against in the policy sued on.

THE PLEADINGS AND FINDINGS.

The complaint, after alleging the issuance of defendant's marine policy insuring plaintiff's cargoes against the usual marine perils, sets forth the shipment of certain canned goods by plaintiff on the small steamer "Rubaiyat" at Olympia, Washington, for a voyage from there to Seattle and alleges that, while on said voyage, said vessel sank by reason of perils insured against and plaintiff's cargo became a total loss.

Defendant's answer admits practically all the allegations of the complaint, simply denying any loss by perils insured against and sets up the following affirmative defense (Record, pp. 19-20):

> "That said vessel, the S. S. 'Rubaiyat', on September 29, 1923, sailed from the port of Olympia, Washington, bound for Seattle via Tacoma, having on board at the time of sailing from Olympia the cargo mentioned in plaintiff's complaint; that said vessel on said voyage called at the port of Tacoma and there took on board additional cargo, to wit: gypsum in sax, plaster in sax and other cargo; that the cargo taken on board said vessel at Tacoma was so improperly stowed on the vessel as to make her topheavy, unstable, tender and unfitted to continue the voyage; that a few minutes after leaving the dock at Tacoma bound for Seattle, she capsized and sunk and with her cargo became a total loss; that at the time the sea was

calm and the weather fair; that the capsizing and sinking of said vessel and the loss of said cargo was caused solely by her said topheavy, unstable, tender and unfit condition, and was not caused by perils of the seas or any other perils or risks covered by the contract of insurance mentioned in plaintiff's complaint."

Plaintiff demurred to this affirmative defense and, after extensive briefs had been filed thereon, the court, in a well reasoned decision, overruled said demurrer, holding that a loss occurring on a calm, clear day, caused solely by overloading, was not a loss by perils of the sea (Record, pp. 21-26). The opinion will well repay perusal.

The case then went to trial and, after evidence had been taken, the court found, *inter alia,* the following facts (Record, pp. 35-37):

"That when said vessel left Tacoma she was so heavily loaded that at her ports she had only about six inches freeboard which was the maximum she could be put down with safety, and she was deeper down on this voyage than on any previous voyage; that there was ample room below to have put all the cargo that was stowed on the upper deck.

"That as said vessel backed out of her dock in the Waterway at Tacoma, she encountered the wash or displacement waves of the steamer 'Indianapolis', which last-named vessel had previously entered the waterway and was then coming to her mooring at the municipal dock on the opposite side of the waterway; that such wash or displacement waves did not cause any undue rolling or indicate crankiness or tenderness of the vessel; that said vessel then proceeded for about four-

teen minutes and for a distance of about two and one-half miles, and without meeting any other vessel, to a point in Commencement Bay, where certain well-known tidal currents exist and a current caused by the waters of the Puyallup River emptying into said Bay. Upon reaching this point her master brought her wheel over one-half point to change her course, whereupon the vessel suddenly took a list to port, then gradually went over to starboard, filled up with water, capsized and sunk, both vessel and cargo becoming a total loss.

"That at the time the surface of the water was calm and the weather was fair and clear. That the listing, capsizing and sinking of the vessel was caused by her being in so topheavy, unstable, tender and unfit condition, due to the improper manner in which the cargo taken on at Tacoma was stowed aboard her as to be unable to withstand the effect of said tidal or cross-currents and was not caused by perils of the seas, or any other perils or risks covered by the contract of insurance hereinbefore mentioned."

Upon these facts judgment was entered for the defendant.

THE EVIDENCE AMPLY SUPPORTS THE FINDINGS AND THE LATTER ARE THEREFORE NOT OPEN TO ATTACK ON THIS APPEAL.

Section 649 of the Revised Statutes provides that:

"The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

In other words, such findings are *conclusive* if there is *any* evidence to support them and cannot be reexamined by the appellate court.

In *Stanley v. Board of Supervisors of the County of Albany,* 121 U. S. 535; 30 L. Ed. 1000, 1002-3, the Supreme Court says:

> "Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it; to its findings of particular facts; and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different."

In *Pacific Postal Tel. Co. v. Fleischner,* 66 Fed. 899, 902-3, this court says:

> "Plaintiff in error excepted to the 2d, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, and 13th, and to parts of the 4th and 5th, findings of fact on the ground 'that they are each and all contrary to the evidence, and that there is no evidence to support such finding and findings'. Plaintiff in error also excepted to the conclusions of law in the case. The ruling of the court in making these findings and in overruling plaintiff's exceptions to the same is assigned as error. This is an attempt to have this court re-examine the evidence in this case, and determine whether or not it supports the findings of the circuit court."
>
> "Section 649, Rev. St., is as follows:
>
> 'Issues of fact in civil cases in any circuit court may be tried and determined by the court

> without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts which may be either general or special, shall have the same effect as the verdict of a jury.'
>
> "The seventh amendment to the constitution of the United States provides that:
>
> 'No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.'
>
> "According to such rules, it could only be re-examined where the court in which the trial was had granted a new trial for sufficient reasons, or the appellate court awarded a venire facias de novo for some error which intervened in the proceedings. Parsons v. Bedford, 3 Pet. 433; Bassette v. U. S., 9 Wall. 38; Insurance Co. v. Folsom, 18 Wall. 237. Giving the findings of a court the same effect as the verdict of a jury and it is evident that this court cannot review the evidence, and determine whether they are supported thereby."

See also, *2 Fed. Statutes Ann.*, 2 ed. p. 215 and numerous cases there cited.

This point is elementary and needs no further comment.

It is therefore superfluous to review the evidence in this case or to refer to the partisan statement thereof in plaintiff in error's brief. It will suffice to say that Captain Ryan of the "Rubaiyat" testified before the United States Inspectors (all of the testimony there adduced being admitted by stipulation at the trial) that she had never carried so much gypsum before, that

she had only about six inches freeboard from the main deck which was the maximum she could be loaded with safety, that she had never been loaded any deeper and that she was deeper by the ports than on previous voyages (Record, pp. 68-69). He also testified that, in addition to carrying 122 tons of cargo (Id. p. 68), she had 15 tons of rock ballast in her (Id. p. 70), so that she had more deadweight tonnage in her than her deadweight capacity of 130 tons (Id. p. 68). Captain Lovejoy, the owner of the vessel, admitted that the improper distribution of her cargo was "probably a big factor" in her capsizing (Id. p. 74) and Captain Ryan admitted that, if he were loading her again, he would not put any cargo on the upper deck (Id. p. 72).

Captain Ryan, like all the other witnesses admitted that there was no sea and hardly any wind (Id. p. 70) and at the trial further testified that it was "perfectly calm" (Id. p. 56).

Under these circumstances, the court's findings that the boat was overloaded and that she sank on a calm day, with the weather fair and clear (Id. pp. 35-36), cannot be impeached in this court.

The court also found that, at the point of sinking (in Tacoma harbor), there were certain *well known* tidal currents and a current caused by the waters of the Puyallup River, which the vessel, loaded as she was, was unable to withstand (Id. p. 36), but it also found that these currents were not perils of the sea or any other perils insured against (Id.), which finding is also conclusive.

Plaintiff in error makes much of the alleged currents in its brief, stating that they "sometimes extend down to a depth of eight or more feet" and that sometimes they are "small whirlpools" (Brief, p. 36). The trial court, however, made no such findings and whatever testimony there may be in that regard is grossly exaggerated and is on a par with the testimony that the "Indianapolis" threw "a displacement wave of some six feet swell" (Brief, p. 4). In view of the number of vessels that go safely out of Tacoma harbor every day of the year, this testimony is, on its face, unworthy of credence and the District Court was entitled to disbelieve it, as it undoubtedly did.

The currents in question were only testified to by Captain Lovejoy (Record, pp. 50-51), who was not aboard the vessel at the time of her loss, and he admitted before the inspectors that these conditions were well known and the "Rubaiyat" was designed to meet them (Id. p. 75) and at the trial that "they are not very strong" (Id. p. 51). Captain Ryan said not one word before the inspectors about these currents (Id. p. 73) and, in fact, expressly stated that *"he was unable to determine the cause of the vessel foundering"* (Id. p. 72). After Captain Lovejoy had given his belated testimony at the trial, Captain Ryan was recalled for further examination by the *court* and gave the following significant testimony (Record, p. 56):

> "Q. (By the Court). *What was the condition of the water just before the vessel listed?*
> A. *It was perfectly calm.*

Q. *It was perfectly calm?* A. *Yes, sir.*
Q. *No current or waves of any sort?*
A. *There is always that current there.*
Q. *What current?*
A. *The cross-current from the river coming in at that point.*
Q. *What was the condition of that cross-current there?*
A. *Well, it is really hard to see the condition of the current.*''

It is further significant that no witness *observed* the currents on the day in question and it is also to be remembered that they are *always* present in Tacoma harbor. It was, as the court found, ''*a well-known* tidal current'' (Id. p. 36), of no significance whatever, and was relied on by plaintiff at the trial as a last desperate hope to save its case from the ruling on demurrer. It is submitted that, if such a current, operating on *all* vessels *ever* leaving Tacoma, is a ''peril of the seas'', insurance companies had best stop doing business. The District Court, however, correctly held that it was *not* such a peril and that finding is conclusive. Plaintiff in error says that ''the lower court held *as a conclusion of law* that such tidal and cross currents were not a peril of the sea'' (Brief, p. 40), but this is not the case, for the finding in question (No. XI) was one of the ''Findings of Fact''. And no one was better qualified to find on this point than the judge presiding in the very locality in question.

The sole question in this case therefore is whether a sinking on a calm clear day, caused *solely* by over-

loading the vessel at an intermediate port, is a peril of the sea insured against in an ordinary marine policy.

PLAINTIFF'S CONTENTION THAT THE LAW OF ENGLAND GOVERNS THE CONSTRUCTION OF THE POLICY IN THIS CASE AS REGARDS THE IMPLIED WARRANTY OF SEAWORTHINESS.

We believe plaintiff is in error in stating that the law of England and America is the same on the subject of the implied warranty of seaworthiness. We also believe that, under American law, there is room for serious doubt as to whether this warranty did not exist when the "Rubaiyat" sailed from Tacoma as well as from Olympia, especially in view of the gross negligence of the master in permitting the vessel to sail in an unseaworthy condition from the latter place (see *4 Joyce on Insurance,* 2 ed. Secs. 2173, 2174; *Union Ins. Co. v. Smith,* 124 U. S. 405; 31 L. Ed. 497, 506). We would also point out that plaintiff has neither pleaded or proved English law, which, in the absence of such proof, is presumed to be like our own (*Liverpool, etc. Steam Co. v. Phoenix Ins. Co.,* 129 U. S. 397; 32 L. Ed. 788, at p. 793).

The defendant, however, does not desire to seek escape from its policy on any such technicality and, if the court should hold that the provision in the policy that the adjustment and settlement of claims shall be made "in conformity with the laws and customs of England" (Record, p. 12) makes English law applica-

ble on the question of *liability* under the policy, we are willing to have the court determine the English law from its own reading of the books. All that defendant desires is a fair and just determination of the case.

We shall proceed with our further argument on the theory that English law is applicable and discuss the case on that basis. Apart from the question of the warranty of seaworthiness, however, we believe the law of both countries to be the same as to all questions involved in the case and we therefore shall not confine ourselves to English decisions.

THE LAW APPLICABLE TO THIS CASE. IT IS NOT THE LAW THAT A SINKING ON A CALM CLEAR DAY CAUSED BY OVERLOADING IS A PERIL OF THE SEA.

Before discussing in detail the law applicable to this case, it will be well to clear up certain points repeatedly referred to in plaintiff's brief and relied on by it as establishing liability.

In the first place plaintiff contends that, as the "Rubaiyat" was seaworthy when she sailed from Olympia, the implied warranty of seaworthiness was complied with and there was no such warranty applicable on sailing from Tacoma. It then further contends that the fact that the officers of a vessel are negligent will not defeat recovery and it repeatedly refers to the well known maxim—*causa proxima non remota spectatur*. All these points can well be admitted. If there is no warranty of seaworthiness, the assured is not to

be prejudiced by actual unseaworthiness, nor is it to be prejudiced by the negligence of the vessel and, if the vessel sinks *by reason of encountering perils of the sea,* it is of no consequence that she might have withstood these perils if she had been seaworthy or not negligent. In *such* cases sea perils are the proximate cause of the loss and unseaworthiness and/or negligence the remote causes. But the assured must prove a loss *by perils insured against* and, if the vessel encounters *no sea perils* and is lost by the *ordinary* action of the winds and waves and currents, which are in no sense fortuitous, then the assured has not proved its case. And, if she is unseaworthy, so as to be unable to withstand *ordinary* conditions, then such unseaworthiness *is* the proximate cause of the loss. If this ground work of the law is understood the case becomes a very simple one.

Plaintiff makes the following astonishing statement in its brief (p. 13):

> "That the 'sinking' or 'foundering' of a vessel is a peril of the sea seems to us too plain to admit of argument."

It cites in support of this bald statement *Arnould on Marine Insurance,* Sec. 812. A reference, however, to the context of that section shows that such sinking is not, of itself, a peril of the seas, but must be *caused* by such a peril. This is made very clear by the following section, where the author says:

> "Foundering at sea, *when proximately caused by the fury of storms and tempests,* is an obvious case of loss by perils of the sea."
>
> *II Arnould,* (10 ed.) Sec. 813.

Plaintiff claims that the policy in this case is governed by English law (Brief, p. 10). In this connection, therefore, it is important to note that under Section 55 of the English Marine Insurance Act of 1906 an insurer is "not liable for any loss which is not proximately caused by a peril insured against." And it is still more important to note that, under Section 7 of the rules for construction of an English policy, it is provided that:

> "The term 'perils of the seas' refers only to fortuitous accidents and casualties of the seas. *It does not include the ordinary action of the winds and waves.*"
>
> *II Arnould,* (10 ed.) p. 1684 (Appendix A).

Arnould says that it is "essential" to bear this provision in mind in fixing the cause of the loss (Id. Sec. 776).

We wish to remark, in passing, that, if ever a boat sank as a result "of the ordinary action of the winds and waves," that boat was the "Rubaiyat." She simply encountered the usual, ordinary and "well-known" (Record, p. 36) currents prevailing in Tacoma harbor and affecting alike *every* vessel going out of that port, which currents, as the lower court found as a *fact,* were *not* perils of the sea.

In line with the above Arnould further remarks in Section 777:

> "The damage caused by springing a leak is not a charge upon the underwriters, unless it be directly traceable to some fortuitous occurrence as where the leak can be proved to have been caused by a heavy sea striking the vessel or by her being

> driven on a rock etc.; where the leak arises from the unseaworthy state of the ship when she sailed, or from wear and tear or natural decay, and is only a consequence of that ordinary amount of straining to which she would unavoidably be exposed in the general and average course of the voyage insured, the underwriter is not liable."

And in Section 825:

> "Where, however, the loss is not proximately caused by the agency of the winds and waves, but is merely the natural result of the contemplated action of sea-water on the subject of insurance, or of the ordinary wear and tear of the voyage, it is not recoverable as a peril of the seas, nor indeed under the policy at all."

And in Section 799, discussing cases *where there is no warranty of seaworthiness,* he says that:

> "Independently of the statute, and the decisions on which it was based, it is *always* open to the underwriter to show that the loss arose, not from any peril insured against, *but directly owing to the unseaworthy condition in which the vessel sailed.*"

That is exactly what was shown in the case at bar and what was found by the court (Finding No. XI, Record, p. 36). No sea perils were encountered and therefore the unseaworthiness of the vessel was the proximate and sole cause of the loss and not in any sense a remote cause.

Plaintiff in its brief cites the following from the case of *Wilson v. Xantho,* 12 A. C. 503 (also referred to with approval in *II Arnould,* Sec. 812):

> "I think it clear that the term perils of the sea does not cover every accident or casualty which

> may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen *not against events which must happen.*"

In the case at bar the capsizing of the "Rubaiyat" could readily have been foreseen and was an event which was *bound to happen* because of her extreme unseaworthy condition when she sailed from Tacoma. Nothing could demonstrate the truth of this statement more forcibly than the fact that the vessel did, *fourteen minutes after sailing* (Record, p. 36), capsize and sink on a calm, clear day and solely as a result of her "top-heavy, unstable, tender and unfit condition" (Id.) and without the intervention of any but the most ordinary sea conditions. She was bound to sink when she started and she did sink.

The most that plaintiff could contend, in this connection, is that foundering at sea is *presumptive* evidence of a loss by perils of the sea, as is well pointed out by this court in *Aetna Insurance Company v. Sacramento Stockton S. S. Co.,* 273 Fed. 55, referred to in plaintiff's brief. The "Rubaiyat," however, did not even founder "at sea." She foundered in Tacoma harbor under conditions which would raise a presumption that

the loss was due to unseaworthiness, happening, as it did, only a few minutes after sailing.

See

The Southwark, 191 U. S. 1; 48 L. Ed. 65, 71;
Steamship Wellesley Co. v. Hooper, 185 Fed. 733, 736-7;
The Arctic Bird, 109 Fed. 167;
Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180;
The Gulnare, 42 Fed. 861;
Walsh v. Insurance Co., 32 N. Y. 436.

Two of the above cases were decided by this court.

Passing by the above inquiry, however, as to whose duty it is to establish the *cause* of the sinking, it is certain that such cause must be established by either plaintiff or defendant and that no liability rests upon defendant, unless the cause, when established, is found to be a "peril of the sea." The court's remark in its ruling on the demurrer that "Here the cause is known" (Record, p. 23) applies equally to the conclusion of the trial, for the court found *as a fact* that the cause was unseaworthiness and *not* perils of the sea. And, as heretofore pointed out, that finding is unassailable on appeal.

Under a fire insurance policy, an assured would hardly contend that a destruction of a house by a gale was covered and so, in a marine policy, a sinking by reason of "the ordinary action of the winds and waves" is not a loss by "perils of the sea" and by the British Marine Insurance Act is expressly defined as not being

such a loss. If the policy were against "all risks" plaintiff might be able to recover, but to allow it to recover in this case would be to delete the terms of the policy as to specified *marine* perils and to construe it as covering *all* perils. Such is not a fair construction of a *specified* kind of insurance, for which plaintiff paid a much smaller premium than it would have for an "all risk" policy, if, indeed, such a policy could have been secured at all. In this connection, we note plaintiff's casual references to the fact (apparently not seriously relied on) that the policy also covers "all other perils, losses and misfortunes that have or shall come etc." This language of course "includes only perils *similar in kind* to the perils specifically mentioned in the policy"—perils which are *ejusdem generis* with those insured (*II Arnould,* 10 ed., Sec. 860; *38 Corpus Juris,* 1109). In *Sassoon & Co. v. Western Assurance Co.,* XII Asp. Mar. Cases 206, where, as in the case at bar, the damage to the cargo was solely due to the unseaworthiness of the vessel, the court said:

> "The risks covered by the policy were the risks usually described in such a contract—namely 'perils of the sea and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said * * * goods.' *It was not contended on the plaintiff's behalf (nor could it have been) that these words covered any risk except the risk of damage by perils of the seas;* but it was said that the loss was due to such a peril."

Judge Neterer held on the demurrer in this case that the clause in question was inapplicable (Record, p. 26) and also found *as a fact* that the loss was not within it

(Id. p. 36). It certainly is not an "all risk" clause and, as it is only mentioned incidentally by plaintiff, we shall not discuss it further. It obviously does not cover accidents happening by "the ordinary action of the winds and waves," which are excluded as causes of a loss under English law.

We feel that we could well rest our case on the foregoing general principles, but we think it wise to refer the court to a few specific authorities supporting them and to clearly distinguish the cases cited by plaintiff.

Especially in point, of course, are cases where there was, as in the case at bar, no warranty of seaworthiness. One of such cases is that of *Sassoon & Co. v. Western Assurance Co.*, XII Asp. Mar. Cases 206, which has just been cited. In that case the vessel sprang a leak, due to the rotten condition of her hulk (which was not known to plaintiffs, as it was covered by copper sheathing) and sea water entered the vessel and damaged plaintiffs' cargo. The policy was a *time* policy, in which, as plaintiffs' counsel clearly pointed out (see p. 207), there was no warranty of seaworthiness. Nevertheless the court said:

> "There was no weather, nor any other fortuitous circumstances, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea. Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss. There is ample authority for so holding, but it is sufficient to cite the judgment of Lord Herschell in The Xantho (sup.),

where he says: 'I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril "of" the sea. Again it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear.'

"An attempt was made during the argument to attribute a different meaning to the expression 'perils of the sea' when used in a policy on goods from that which it bears when used in a policy on ship; but no authority was cited for the distinction, nor would it be right in principle to make any such distinction. In the case above cited an attempt was made to draw a distinction between the meaning to be given to the words when used in a bill of lading and in a policy of insurance, but Lord Herschell said, 'It would, in my opinion, be very objectionable unless well settled authority compelled it to give a different meaning to the same words occurring in two maritime instruments.'

"In this case the damage though doubtless proximately due to sea water, was not in any sense due to sea peril. It does not therefore fall within the policy."

This case also disposes of plaintiff's argument (Brief, pp. 37-38) that a shipper of cargo stands in any different position from the shipowner himself.

In *Fawcus v. Sarsfield,* 6 E. & B. 192; 119 Eng. Rep. 836, the court expressly held there was no warranty of seaworthiness. In that case the vessel, before meeting any unusual weather, was damaged and obliged to put back for repairs. On resuming the voyage she was

dashed against a rock and sunk. The owners sued for the cost of the repairs and also for the loss of the ship and were held entitled to recover for the latter, but not for the former. The court said in part (p. 840):

> "Upon the whole, it seems to me that in this case the underwriters cannot set up any implied warranty of seaworthiness, and that they are liable for the final loss of the ship, which is allowed to have arisen by the perils of the sea insured against.
>
> "But a different question arises respecting their liability for the expense occasioned by reason of her putting into a port to be repaired, the loss to which the fourth plea is pleaded. The arbitrator has found that the facts alleged in that plea are true, although without the knowledge of the assured. What are these facts? That, when the ship sailed from Liverpool, she was in an unseaworthy and unsound state and condition, and so continued till after this loss accrued; that she was not reasonably fit to encounter, and bear the ordinary force of the winds and waves; that, during this time, she did not encounter any more severe weather than is usual and ordinary on such a voyage or than a ship reasonably fit for the voyage could have encountered without damage or injury: and that the necessity for her going into port to be repaired arose from the defective state of the ship when she sailed.
>
> "Although she was not seaworthy when she sailed, it must be taken, according to my view of the case, that the policy attached; but, unless this loss arose from perils insured against, it cannot be cast upon the underwriters. Now the arbitrator appears to find most explicitly that it did not arise from any peril insured against, but from the vice of the subject of insurance."

This case is referred to with approval in *Dudgeon v. Pembroke,* II Asp. Mar. Cases 323, 331.

The above cases are cited first because they are English cases and plaintiff claims that English law governs the case at bar. Far more in point than either of them, however, is a recent American case which follows their doctrines—*New Orleans T. & M. Ry. Co. v. Union Marine Insurance Company Ltd.* (the same defendant as in the case at bar), 286 Fed. 32, decided by the Circuit Court of Appeals for the Fifth Circuit in 1923. In that case a barge sank at her dock in calm weather, due to her unseaworthy condition, resulting in the loss of most of her cargo. The cargo owner sued the present defendant under a policy precisely similar to the one in the case at bar. There was a question as to whether there was an implied warranty of seaworthiness, but it will be noted that the court decided the case on the assumption that there was no such warranty. The court said (pp. 34-35):

> "But, whether these policies contained such an implied warranty or not, we do not think that the loss covered in this case is within the perils insured against by them.
>
> "An insurance policy only insures against the perils named in the contract of insurance. *Fawcus v. Sarsfield,* 6 El. & Bl. 192, 204.
>
> "Here the evidence showed that no peril of the river, but the unseaworthiness of the barge, caused the loss. Unquestionably the barge sank from water entering through open seams. The evidence preponderates in favor of the finding of the District Court that the seams above the water line had been opened by the hot sun, and the oakum therein was loose or had fallen out entirely, thus causing her to fill with water when in the course of loading these seams were forced below the water line, and

that the loss occurred by reason of this unseaworthy condition.

"An unseaworthy condition of the vessel at the time the insurance attaches is not a peril of the sea (river), and under a policy where there is no warranty of seaworthiness, express or implied, a loss of vessel or cargo, by reason of such unseaworthiness is not covered by such policy. *Arnould on Marine Insurance,* §799; *Fawcus v. Sarsfield,* 6 El. & Bl. 192, 204; *Sassoon & Co. v. Western Ass. Co.,* (1912) A. C. 561, 563."

It seems to us that this case conclusively disposes of plaintiff's contention that a sinking, in and of itself, is a peril insured against.

Another case strongly in point is that of *Gulf Transportation Co. v. Fireman's Fund Ins. Co.,* 83 Southern 730, where a barge was insured under a policy practically identical with that in the case at bar. The barge broke down *about thirty minutes after starting on her voyage under the weight of her own cargo,* without encountering any unusual weather conditions. She had previously been fully repaired *by the insurer* and, for this reason, the court decided the case on the assumption that there was no warranty of seaworthiness. The court says in part (at p. 733):

"But, if it be granted that appellee admitted the seaworthiness of the vessel at the commencement of the voyage down Houston Ship Channel, it does not follow that appellant is thereby entitled to recover under the policy. The loss complained of must be one within the terms of the policy. Certainly if the vessel broke under the weight of her own cargo, without encountering any perils of the sea, there can be no recovery. The testimony in the case justifies such a conclusion of the chancellor;

and, so, any presumptions or conjectures must yield to the proof. It is not a case where a vessel sinks without any known cause. Competent surveyors have examined the barge since the last mishap and give their testimony as experts on the real efficient cause of the accident. Under this view, it is unnecessary to indulge in any presumptions in favor of seaworthiness, or as to the burden of proof on this point. Aside from the usual presumptions so much discussed in the briefs, there was no extraordinary circumstance of weather, wind, rocks, sand, or any other fortuitous event which contributed in whole or in part to the loss complained of. It is not a case of stranding, and therefore a loss under the policy.

"Counsel for appellant cite *Arnould on Marine Insurance* (9th E.) par. 694, to the point that, if the ship starts seaworthy, the underwriters are precluded of any defense based upon any alleged unseaworthy condition. The author is there discussing cases in which the underwriters on the face of the policy 'allowed the vessel to be seaworthy for the voyage,' and the effect of such a provision on a loss 'caused remotely by the ship having become unseaworthy, but proximately by a peril insured against.' Counsel have cited no case which does not require the loss to be 'proximately caused' by one of the perils insured against. Surely the contract must govern the rights and obligations of the parties, and, as stated by counsel for appellee, 'an insurance policy is not a promissory note.' It is certainly not our purpose to define the term 'perils of the sea' or to indicate all the losses comprehended by a policy of marine insurance. Our duty in the case at bar is to determine whether the misfortune is an extraordinary or fortuitous accident against which indemnity is given, or an ordinary event which is not contemplated by the policy."

It is submitted that the above reasoning completely refutes practically all of plaintiff's contentions in the

case at bar. In that case, as in this, the vessel collapsed "under the weight of her own cargo."

All of the above cases are especially in point in that they were decided on the basis of no warranty of seaworthiness being involved, the absence of which is plaintiff's chief reliance in this case. There are, however, many other cases worth citing on the general principles involved, of which we shall refer to only a few.

In *Anderson v. Greenwich Ins. Co.,* 79 Fed. 125, a barge loaded with lumber, while being towed in a narrow channel-way from West Duluth, rolled so as to dump her deck cargo. In dismissing the libel (alleging that the loss was caused by sea perils) Judge Brown said:

> "Under circumstances like the present, in a clear day, in moderate weather, in a quiet stream, the fact that a boat is so loaded as to dump a considerable portion of her deck load, is of itself persuasive evidence that the accident was because the vessel was topheavy, in the absence of any clear proof that her navigation was such as would naturally be expected to cause a properly loaded boat to dump her cargo. 'Res ipsa loquitur.' It is not enough to say that if the boat had been towed very slowly, and with extreme care, and had never touched bottom, she might have escaped dumping. She was loaded for a trip to Tonawanda, a distance of several hundred miles. Her loading was bound to be such as would be safe in all ordinary changes of weather, *and with all the ordinary incidents of navigation,* conducted in the ordinary manner. I am persuaded that this boat was not so loaded. See *Sumner v. Caswell,* 20 Fed. 253."

The case is extremely interesting in that the vessel in question was so loaded as to be "topheavy" just as was the "Rubaiyat" in the case at bar.

Another very similar case is that of *Cary v. Home Insurance Co.,* 1923 Am. Maritime Cases 439, where an improperly loaded scow capsized at her dock. In holding that the loss was not due to perils insured against, the court said:

> "The question is: 'Did the scow encounter a disaster which disabled and rendered her unseaworthy or was her unseaworthiness the cause of her disaster?' It appears that the scow after a short voyage in moderate weather, when moored in calm water, listed and turned over; that the cause was (a) leakiness whereby the water entered the hold, (b) want of ordinary care in placing a portion of the cargo preparatory to unloading another portion of it, which caused the cargo to roll when the ship had listed sufficiently to put it in motion. As the scow lay at the dock, she was unfit to encounter the ordinary danger of turning over. Her unfitness made her list and made her cargo shift. No other explanation suggests itself. She was a leaky scow with a cargo improperly stowed. In short she was unseaworthy, and her own defects, not the perils or dangers of the sea, were responsible for her misfortune."

See also:

Mannheim Ins. Co. v. Clark, 157 S. W. 291, at pp. 297, 298;

The S. S. Keokuk v. Home Ins. Co., 9 Wall. 526, 19 L. Ed. 746 at p. 747 (last paragraph);

Merchants Trading Co. v. Universal Marine Co., Not reported, but cited with approval in *Dudgeon v. Pembroke,* II Asp. Mar. Cases at pp. 331-332;

Ballantyne v. Mackinnon, VIII Id. 173.

We respectfully submit that the above authorities plainly show (1) that a plaintiff must show perils of the sea to recover under a marine policy, (2) that a sinking alone is not such a peril, especially where, as here, the cause of the sinking is known and specifically found by the court (which finding has the effect of a verdict of the jury) and (3) that a loss due to unseaworthiness alone is not recoverable, even when there is no warranty of seaworthiness.

Applying these principles to the case at bar and the findings of the trial court as to the cause of the loss, it is apparent that plaintiff cannot recover in this suit.

We now turn to the cases cited by plaintiff, which, when critically examined, will be found to reinforce our position.

CASES CITED BY PLAINTIFF IN ERROR.

Plaintiff has cited a large number of cases in its brief, most of which, in our opinion, are obviously inapplicable. We shall not attempt to deal with all of the cases so cited, but will briefly distinguish those principally relied on.

Plaintiff draws broad conclusions from the case of *Aetna Insurance Company v. Sacramento Stockton Steamship Company,* 273 Fed. 55, decided by this court, which are not warranted by the record. In that case one of the insurer's own witnesses testified that the vessel was in a "bad storm," which, the court held, caused her loss. It was only in view of *this* evidence that it held that it was not error to reject testimony as

to unseaworthiness. It did *not* hold, as stated by plaintiff, that the "foundering" was the proximate cause of the loss, but that "perils of the sea" caused the foundering. It further said that, under English law and practice, "*severe* storms, *rough* seas and even fogs may be comprised in perils of the seas." If *foundering alone* were a peril of the sea the court was wasting its time in writing the elaborate opinion which it did and the decision is wholly inconsistent with any such theory. We are glad to unreservedly accept the tests of perils of the sea laid down in that case and we also unreservedly assert that the case at bar cannot be brought within those tests.

In the case of *Dixon v. Sadler,* 5 M. & W. 405; 151 Eng. Rep. 172 (to which plaintiff devotes six pages of its brief) the vessel capsized as a result of "a strong squall" coming on her from the southeast (151 Eng. Rep. at p. 173). The defendant *admitted* in his answer that the loss was caused "by perils of the sea" (Id. p. 172), but alleged that, by reason of her unseaworthy condition, and the negligence of her crew, she was unable to withstand such perils, which, if seaworthy, she could have withstood. As there was no warranty of seaworthiness, the plea was obviously bad and perils of the sea were the proximate cause of the loss and unseaworthiness and negligence only the remote causes. The exact contrary is true in the case at bar.

The next case cited is *Dudgeon v. Pembroke,* 3 Asp. Mar. Cases 393 (to which over four pages are devoted). All that this case holds is that, where there is no warranty of seaworthiness, a loss *caused by perils of the*

sea is recoverable under the policy, even though the vessel could have withstood such perils if seaworthy—the same holding as in *Dixon v. Sadler,* supra. An earlier report of the case shows that a gale of wind or at least a very heavy one was blowing, that "a heavy rolling sea was running and it became necessary to put a sail over the stokehold to prevent the sea from getting in," that the vessel labored heavily making much water and was finally shipwrecked (III Asp. Mar. Cases at pp. 102-103). In other words there was a loss *by perils of the sea* and here again unseaworthiness was only the remote cause of the loss. In the case at bar it was the *direct* cause.

All of the above three cases were the subject of careful and most elaborate opinions and hold no more than we have already conceded in this brief. If, as contended by plaintiff, the mere capsizing of a vessel is, in and of itself, a peril of the sea, why did none of these courts discover this very simple solution of the problem, which would have saved all their labors. The answer is self-evident. *Capsizing alone is not a peril of the sea* and, to recover for capsizing, perils of the sea must be *proved.* There is no other basis on which the decisions in these three very well reasoned cases can be explained. None of them warrant a recovery for a sinking or capsizing in calm water and under ordinary and usual conditions.

None of the other cases cited demand extended comment. In *Walker v. Maitland,* 106 Eng. Rep. 1155, a vessel was stranded through the negligence of her crew and was beaten to pieces by the "violence of the winds

and waves." In *Trinder, Anderson & Co. v. T. & M. Ins. Co.,* 8 Asp. Mar. Cases 273, a negligent stranding was also involved, after which the vessel beat heavily on the reef and the seas washed over her, so that the freight on the cargo became a total loss. In *Redman v. Wilson,* 12 M. & W. 476, a vessel broke loose in a tornado and began to leak and finally was run ashore to prevent her sinking and became a total loss. The loss was clearly due to perils of the seas and the negligent loading, referred to by plaintiff, was therefore merely a remote cause of the loss, just as the negligence in the two previous cases was also remote. *American Hawaiian S. S. Co. v. Bennett,* 207 Fed. 510, was also a stranding case where a lighter in tow of another vessel struck the bank of a creek and became a total loss.

All of the above four cases are *stranding* cases, in which the strandings and subsequent loss of the vessels involved were held to be perils of the sea. In this respect they resemble losses by collision, which also is a loss by perils insured against. Both involve striking some ship or other obstacle and both are, under the terms of the English Marine Insurance Act, "fortuitous accidents and casualties of the sea," which are *not* caused by "the ordinary action of the winds and waves." The latter losses are excluded by the policy.

The case of *Wilson v. Xantho,* 12 A. C. 503, is a collision case and no one now doubts that a loss by collision is one by perils insured against and is "fortuitous" just as is a stranding. None of these cases are in point in the case at bar.

In the case of *Orient Insurance Company v. Adams,* 123 U. S. 67, a vessel was negligently unmoored by her master and, having no steam up, drifted over the falls of the Ohio River. Drifting over the falls was unquestionably a peril insured against and here again the negligence of the master was the remote and not the proximate cause of the loss. If the "Rubaiyat" had drifted over any falls this case would not be in court and the policy would have been paid. If the vessel in the *Adams* case had sunk in the ordinary currents of the Ohio River and the court had held this a peril of the river, the case would be in point, but there is no such holding in that case or in any other of which we are aware.

As for the case of *Crescent Ins. Co. v. Vicksburg etc. Co.,* 69 Miss. 208; 13 So. 254, where it was held that the damage to cotton bales by the careening of a vessel (due to negligent unloading) was "a peril of the river," because the damage was caused by "water of the river," we have only to say that we do not agree with its conclusions and we think that in *that* case the negligence of the crew was the proximate cause of the loss. The court makes a clear misapplication of the case of *Redman v. Wilson,* supra, in reaching its conclusion. The case is squarely opposed to the cases of *New Orleans v. Union Marine Ins. Co.,* 286 Fed. 32; *Anderson v. Greenwich Insurance Co.,* 79 Fed. 125 and *Cary v. Home Ins. Co.,* 1923 Am. Mar. Cases 439, heretofore cited by us.

Plaintiff's cases (except for the one last mentioned) establish only the elementary proposition that, when a

vessel or cargo is lost or damaged *by sea perils,* the fact that the vessel was unseaworthy (if there is no warranty of seaworthiness) or her crew were negligent is no defense under the policy, such unseaworthiness and negligence being considered, under well settled marine insurance law, to be only the remote causes of the loss or damage. But, to bring this principle into play, *there must be a loss by sea perils* and, if a vessel is lost by reason of unseaworthiness or negligence *without sea perils,* then such unseaworthiness or negligence becomes the *proximate* cause of the loss and not the remote cause. And, as already pointed out, plaintiff's own cases abundantly establish that capsizing or sinking, taken by itself, is not a sea peril.

We cannot do better in closing this discussion of the law than by citing the following apt language of the Supreme Court in *Hazard v. New England Marine Ins. Co.,* 8 Peters 557, 585:

> "In an enlarged sense all losses which occur from maritime adventures may be said to arise from perils of the sea; but the underwriters are not bound to that extent. They insure against losses from extraordinary occurrences only, such as stress of weather, winds and waves, lightning, tempest, rocks, etc. These are understood to be the perils of the sea referred to in the policy, *and not those ordinary perils which every vessel must encounter.*"

The alleged "current," which, plaintiff contends, caused the loss was clearly one of "those ordinary perils which every vessel must encounter," and which vessels sailing in and out of Tacoma harbor encounter

every day. As said by Captain Ryan "there is *always* that current there" (Record, p. 56). To call it a "peril of the seas" would be, in our opinion, both a travesty and a tragedy.

SUMMARY OF POINTS INVOLVED IN THIS CASE.

Summing up the various points involved in this case we find:

1. That the District Court's findings of fact are conclusive and are unassailable on appeal and that therefore the only question before the court is whether they support the judgment.

2. That hence plaintiff's discussion of the evidence in this case and especially the exaggerated evidence in regard to the currents is immaterial and extraneous to the issues made by the appeal.

3. That the findings of the District Court amply support the judgment, especially its findings that the "well known" currents in Tacoma harbor are not "perils of the seas, or any other perils or risks covered by the contract of insurance" and that the sole cause of the loss was the "topheavy, unstable, tender and unfit condition" of the vessel.

4. That the cases cited, both by plaintiff and defendant, conclusively establish that a sinking alone is not a peril insured against in an ordinary marine policy such as that in the case at bar.

5. That a loss solely due to unseaworthiness (as the trial court found plaintiff's loss to be) is not recover-

able, even though there be no warranty of seaworthiness attached to the policy.

CONCLUSION.

Plaintiff claims that, if the judgment in this case is reversed, judgment should be entered in its favor. Plaintiff here, as in other parts of its brief, proceeds on the assumption that this is an admiralty case and, of course, all it can possibly ask for is a new trial. We confidently submit, however, that the judgment is in all respects correct and in accordance with well settled principles of marine insurance law and that it should therefore be affirmed.

Respectfully submitted,

S. Hasket Derby,
Carroll Single,
Bruce C. Shorts,
Attorneys for Defendant in Error.

Dated, San Francisco,
October 28th, 1925.